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9 DARREN CORNELIUS STANLEY

10
11 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA
12 **SAN FRANCISCO DIVISION**

13 DARREN CORNELIUS STANLEY,

14 Petitioner,

15 vs.

16 RON DAVIS, Warden,
17 San Quentin State Prison,

18 Respondent.
19

No. C07-4727-EMC

DEATH PENALTY CASE

**DECLARATION OF COUNSEL
IN SUPPORT OF FOURTH MOTION
FOR EQUITABLE TOLLING**

20 I, David A. Nickerson, declare that:

21 1. I am an attorney licensed to practice law in the State of California and am
22 appointed counsel for Petitioner Darren Stanley in the above captioned habeas proceeding. This
23 sealed declaration is made on information and belief based upon my review of the records in this
24 case and the investigation done to date into several ineffective assistance of counsel claims. This
25 sealed declaration is made in support of Petitioner's Fourth Motion for Equitable Tolling.

26 2. Below, I will set forth a short outline of the pertinent history of Petitioner Stanley's
27 representation in state court before, during, and after his trial. These facts provide the context in
28 which Stanley will assert numerous ineffective assistance of counsel claims in his finalized

1 petition. For instance, Stanley will assert in his finalized petition claims that he was incompetent
2 at the time of trial, that his trial counsel were ineffective for failing to raise that issue, and that a
3 viable insanity defense was neither investigated nor presented at the guilt phase of trial. Stanley
4 will also assert that trial counsel failed to investigate or present a vast amount of evidence in
5 mitigation at the penalty phase of trial. After setting forth the facts relevant to Stanley's
6 ineffective assistance of counsel claims, I will indicate the factual gaps which remain as a result of
7 Stanley's incompetence and trial counsel's death.

8 3. Stanley was arrested in Oakland on January 12, 1989. Shortly thereafter, Lincoln
9 Mintz was appointed as his counsel. There is not known evidence that Mintz ever hired an
10 investigator or conducted any investigation into Stanley's case. Mintz was relieved as counsel
11 before the preliminary hearing based on a *Marsden* motion. Mintz was disbarred by the California
12 Supreme Court in 2000. Mintz died in 2012.

13 4. Stanley was charged with the capital murder/robbery of Rudy Rubaclava.
14 Rubaclava was stabbed on January 8, 1989. Stanley was also charged with eight other robberies.
15 These robberies began on December 24, 1988 and ended on January 12, 1989, when Stanley was
16 arrested.

17 5. Lead trial counsel, Walter Cannady, was appointed by the court on January 9,
18 1990. Walter Cannady died on August 7, 2013. On or about January 22, 1990, Cannady hired a
19 private investigator, Brian Olivier. Richard Humphrey was appointed as co-counsel for Stanley on
20 February 9, 1990.

21 6. Olivier and his associate, Clarrick Brown, interviewed numerous witnesses
22 concerning the robberies. They also interviewed numerous witnesses concerning the Rubaclava
23 murder/robbery, including possible alibi witnesses. As far as can be determined from their case
24 file, Olivier and Brown conducted only guilt phase investigation. However, several witnesses
25 interviewed by Olivier, such as Stanley's brother Issac, were called as defense witnesses at the
26 penalty phase.

1 7. On April 5, 1990, just two months after Humphrey's appointment but fifteen
2 months after Stanley's arrest, Humphrey wrote Cannady letter. Humphrey indicated in his letter
3 that he thought Olivier knew what to do about the guilt phase investigation. Humphrey thought,
4 however, that they needed a second investigator for the penalty phase. (It is not known whether
5 Olivier had ever conducted a penalty phase defense.) Humphrey noted that no penalty phase
6 investigation had yet been conducted. Humphrey suggested they hire a "social historian" to give
7 them insight into Stanley's "psychological make-up" as part of the penalty phase investigation.
8 Humphrey expressed concern that Stanley had psychological issues which were relevant to the
9 defense of a charged capital-eligible murder.

10 8. On about April 6, 1990, Cannady hired Dr. Samuel Benson, a psychiatrist. The
11 timing was coincidental - Dr. Benson was not hired as a result of Humphrey's letter. It also does
12 not appear that Dr. Benson was hired as the "social historian" Humphrey requested.

13 9. In a declaration prepared by Cannady in support of a funding request, Cannady
14 explained why he hired Dr. Benson. Cannady said that Stanley "was somewhat extremely difficult
15 to deal with and his behavior was somewhat erratic." Cannady described Stanley as "an extremely
16 volatile type individual." In light of Stanley's behavior, Cannady "decided to bring in a
17 psychiatrist to *deal with* Mr. Stanley." [Emphasis added.] Cannady thought this was the "only way
18 to keep in control and able to help provide a defense with respect to this matter or even present a
19 defense is through getting down to the basic mental problems that exist within him (Stanley)."

20 10. Dr. Benson interviewed Stanley on May 21, 1990. Stanley told Benson several
21 things of note to our preparation of the finalized petition. Stanley told Benson that he was born
22 and raised in New York. Stanley remembered traveling back and forth between California and
23 New York as a child on an airplane, bus, and a camper. [Counsel do not believe any of this is true.]
24 Stanley was born and raised in California. There is no known evidence Stanley has ever left
25 California at any time in his life. Stanley said he was told that he fell out of a police car following
26 a juvenile arrest, but that he had no memory of this incident. Stanley said he couldn't remember
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1 what happened yesterday.

2 11. Dr. Benson interviewed Stanley again on June 4, 1990. During this interview
3 Stanley told Benson that he (Stanley) is “too bright.” He also said he learned Swahili, African, and
4 some Hebrew. He said he could speak and write Arabic. He said these language skills were links
5 to his “original people.” He told Benson that he also learned math and spelling because he was
6 going into business someday. He also told Benson that he was “into the Nation of Islam” and
7 “would read my Koran and say my Latin.” Stanley told Dr. Benson that his grandmother “was full
8 blood Indian.” [None of these claims were true.]

9 12. On May 23, 1990, Olivier interviewed Stanley’s brother, Issac. The interview was
10 tape-recorded. Issac told the defense investigator that he was with Stanley the night Rubaclava
11 was stabbed. Issac said that Stanley smoked marijuana and crack that night. At some time after
12 midnight Issac and Stanley sat down on a bench across the street from a gas station at the
13 intersection of 7th and Market Streets in Oakland. Stanley told Issac he was going over to the gas
14 station to get cigarettes. Issac then saw Stanley cross the street to the gas station. Issac then saw
15 Stanley in an altercation with a larger Mexican man at the gas station. He saw Stanley pull out a
16 knife. The Mexican lunged at Stanley and Stanley lunged back several times. Stanley then ran
17 back across the street and disappeared from Issac’s view.

18 13. Olivier knew from police reports that Rubaclava was stabbed at a Shell gas station
19 at the corner of 7th and Market Streets at about 3:45 a.m. on January 8, 1989. On or about June 19,
20 1990, Olivier’s associate, Clarick Brown, interviewed Stanley. Consistent with what he told Dr.
21 Benson, Stanley told the investigator that he was born and raised in Brooklyn, New York. Stanley
22 said he came to live in Oakland, California when he entered the sixth grade. None of this was true.

23 14. In the very same interview, Stanley told the investigator that on the night Rubaclava
24 was stabbed he (Stanley) stayed in a motel with a “toss-up” woman he just met on the street. He
25 was kicked out of the motel around 2 a.m. and walked to his father’s house where he slept until the
26 morning. Stanley never mentioned being with his brother Issac that night.

1 20. At the time of this evaluation, Drs. Pierce and Benson had interviewed only two
2 members of Stanley's family or friends. They had interviewed Stanley's uncle, Reverend Joseph
3 Hayes on June 16th and Stanley's father, Otis, on July 16th. They had reviewed no records or
4 documents concerning Stanley's social history such as school, prison, probation, or CYA records.
5 No second investigator or social historian had ever been hired.

6 21. On August 15, 1990, Olivier wrote Cannady a memorandum setting forth a
7 "Proposed Scope of Investigation For Jury Trial." Olivier listed in this memo "Documents to Be
8 Subpoenaed (Or Court Order Applied For)." The first document Olivier listed were "CYA records
9 for defendant Stanley."

10 22. Cannady submitted another request to the court for funds. He prepared a letter and
11 a declaration dated August 24, 1990, in support of his request. However, these documents were
12 not filed with the court until September 28, 1990. The cause of the one month delay is not known.
13 Cannady's letter dated August 24, 1990 was nearly identical to the letter he sent the committee on
14 August 3 except that he requested \$22,000 instead of \$17,500. Cannady's declaration stated that
15 he did not normally hire "medical doctors" in a case until there were "medical problems which
16 should be explored pursuant to Mr. Stanley's capacity to commit murder." However, Stanley's
17 case "was an exception due to his erratic behavior" and because "Mr. Stanley is an extremely
18 volatile type individual."

19 23. Cannady's declaration further stated that he met with Drs. Pierce and Benson on
20 August 13, 1990, and that they informed him there were "no findings of any psychological nor
21 neurological brain damage which will account for any psychological possibility of a defense to the
22 present crimes charged. At this point the trial itself, as far as the guilt phase will not involve any
23 psychological work nor any mitigation due to psychological and/or physiological damage based
24 upon the doctors findings."

25 24. Cannady finally stated that he expected Stanley to be convicted of first murder with
26 special circumstances, thus requiring a penalty phase trial, "unless something drastically changes,
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1 with respect to either Mr. Stanley's attitude or we manage to pick a jury of subnormal
2 intelligence." According to Cannady, "Mr. Stanley's only way out of the gas chamber, if there is a
3 conviction, is going to be straight on the psychological background and his upbringing, which is
4 going to require the doctors."

5 25. It appears clear that as of mid-August 1990, Cannady decided that no mental state
6 evidence or defense would be presented at the guilt phase of trial and no further investigation
7 would be conducted concerning such evidence. Cannady was resigned to the probability that
8 Stanley would be convicted of first degree murder and a special circumstance making Stanley
9 death penalty eligible and a penalty phase trial necessary. On the one hand, Cannaday said "as far
10 as the guilt phase will not involve any psychological work *nor any mitigation due to psychological*
11 *and/or physiological damage.*" On the other hand, Cannady said the penalty phase defense would
12 consist of testimony from "the doctors," that is Drs. Benson and Pierce, concerning Stanley's
13 "psychological background and upbringing." Why Cannady used the term "mitigation" at the guilt
14 phase is not known, or precisely knowable due to Cannady's death.

15 26. Richard Humphrey appeared in court as co-counsel for Stanley on December 17,
16 1990. Humphrey made no further appearances on behalf of Stanley. Beside Humphrey's memo
17 articulating the need for a mental state defense and mitigation work-up, and Cannady's conclusion
18 that no mental state defense and mitigaition work up would be done, we do not know why
19 Humphrey withdrew from the representation. Nor do we have any billing records of any counsel
20 in the case, as Alameda Superior Court did not retain these records per their response to our
21 subpoena in this matter. At a hearing on January 17, 1991, Cannady appeared alone as counsel for
22 Stanley. On February 1, 1991, Richard Hove appeared as co-counsel for Stanley with Cannady
23 still acting as lead counsel. Hove acted as co-counsel at trial which began on February 26, 1991.
24 Hove was disbarred by the California Supreme Court in 2008.

25 27. After August 24, 1990, the date of Cannady's request for funds, Dr. Pierce worked
26 an additional two hours on Stanley's case in the month of August. This consisted of a two hour
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1 “consultation with Dr. Benson.” Neither Dr. Benson or Dr. Pierce performed any work in
2 Stanley’s case in September or October, 1990. On November 15, 1990, Drs. Pierce and Benson
3 interviewed Stanley’s uncle, Reverend Hayes, for a second time and consulted with each other.
4 This took three hours. Dr. Pierce and Dr. Benson consulted with each other again on December
5 17, 1990, for two hours. Dr. Pierce claimed he “attempted to interview” Stanley on February 1,
6 1991. This took one hour. After that date, neither doctor performed any work in Stanley’s case
7 until May 23, 1991. The penalty phase trial began on June 11, 1991. In short, between August 24,
8 1990 and May 23, 1991, Dr. Pierce worked a total of eight hours and Dr. Benson worked a total of
9 nine hours in Stanley’s case. Except for the interview of Reverend Hayes on November 15, 1990,
10 these hours consisted almost entirely of the two doctors consulting with each other.

11 28. In a declaration filed in conjunction with Stanley’s state habeas petition, Dr. Pierce
12 stated that as “early as August 1990, my third month into Mr. Stanley’s case, Mr. Cannady
13 informed me that there were problems with securing necessary funding...In October 1990, Mr.
14 Cannady told me to stop working until the money issue was resolved...I continued to work on the
15 case until December 1990. I thereafter did not receive any communication from trial counsel or
16 the investigator until May, 1991, five months later, just on the eve of my testimony.” While Dr.
17 Pierce stated that he continued to work on Stanley’s case “until December”, as stated above, he
18 actually did nothing in September or October, 1990, and spent only three hours on the case in
19 November.

20 29. In a letter to Superior Court Judges Taber and Kawaichi, who had been on the
21 Superior Court’s funding committee, Dr. Pierce stated, “From December 1990 until May 23, 1991,
22 except for one attempt to visit Mr. Stanley, no services were performed nor was much information
23 received from the attorneys concerning the case. After a five month period, the attorneys again
24 contacted me and stated the need to prepare for the penalty phase of the case. On May 23, 1991,
25 we met to decide what was needed.”

26 30. In short, from August 24, 1990, when Cannady decided that the penalty phase
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1 defense would consist of the testimony of Drs. Benson and Pierce concerning Stanley's
2 "psychological background and upbringing," until May 23, 1991, virtually nothing was done to
3 investigate Stanley's "psychological background and upbringing." Dr. Pierce expressly stated that
4 during this time frame "no services were performed nor was much information received."

5 31. Similarly in a declaration filed in conjunction with Stanley's state habeas petition,
6 Dr. Benson said that "sometime in December 1990 defense counsel indicated that it was likely that
7 I would not be paid for future work due to funding problems with the county...I suspended my
8 work at that time." Dr. Benson also stated, "Defense counsel and defense investigators did not
9 communicate with me until May 1991, on the eve of the penalty phase, to prepare to testify in the
10 penalty phase." He added, "due to lack of proper funding I was only prepared for trial by defense
11 counsel in a cursory manner."

12 32. Trial began with jury selection on February 26, 1991. Guilt phase closing
13 arguments were given on June 4 and 5, 1991. No mental state evidence was presented at the guilt
14 phase. The defense asserted at trial was that Stanley had an alibi and was not involved in the death
15 of Rubaclava.

16 33. Dr. Pierce wrote a one-page memorandum dated May 24, 1991. In it he stated that
17 he reviewed the following documents concerning Stanley's case: police reports and crime reports -
18 Oakland; RAP sheets and motions and orders for discovery; Olivier's Report of Investigation
19 dated March 28, 1990; and "investigators interviews of witnesses and police interviews." Pierce
20 stated he needed the following documents "from Olivier": Stanley's school records, juvenile and
21 CYA records, probation records, parole records, and records from the state prisons at Vacaville,
22 Soledad, and Folsom. Pierce indicated that the following interviews should be conducted:
23 Reverend Hayes "and other Ministers," "Father and Stepmother," Trenda Gilmore," and "Darren."
24 He also requested that someone obtain criminal statistics for Alameda County.

25 34. Cannady filed another request for funds from the court on May 24, 1991. In this
26 request, Cannady asked for funds for Drs. Benson and Pierce "for work done to date...for past
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1 medical examinations.” He also requested \$5,000 “in advance for Dr. Benson’s and Dr. Pierce’s
2 testimony at the penalty phase” at a rate of \$250 per hour. He did not request any funds for further
3 investigation. On May 29, 1991, the committee granted Cannady’s request concerning the
4 testimony of Drs. Benson and Pierce, except at a rate of \$150 for Benson and \$100 for Pierce per
5 hour. The committee stated, “No other expenditures are authorized or will be paid for these two
6 experts witnesses without prior showing of good cause.”

7 35. After meeting with Cannady and Dr. Benson on May 23, 1991, Dr. Pierce
8 interviewed Otis Stanley (Stanley’s father) and Pearl Stanley (Stanley’s stepmother) on June 1,
9 1991. He interviewed Reverend Hayes for a third time that same day. On June 8, 1991, Pierce
10 interviewed Reverends Hayes, Jackson and Wright.

11 36. All of the defense penalty phase witnesses, except Drs. Benson and Pierce, testified
12 on the afternoon of June 18, 1991. The mitigation witnesses consisted of five family members and
13 a former Oakland police officer. Drs. Benson and Pierce testified on June 19, 1991. Cannady
14 called himself as a defense witness on June 24, 1991. His direct examination concerned only the
15 fact that he requested grievance hearings for Stanley at the county jail. Cannady did not attend any
16 of these grievance hearings.

17 37. At the penalty phase Tenda Stanley testified that she married Stanley while he was
18 in the county jail awaiting trial. She claimed he was a loving man and had helped her.

19 38. Otis Stanley was Stanley’s father. Otis separated from Stanley’s mother, Dorothy,
20 when Stanley was between one and two years old. Dorothy abused alcohol and neglected her
21 children. Dorothy died when Stanley was sixteen. Otis tried to teach Stanley right from wrong.
22 He disciplined Stanley and took him to church. He believed Stanley led a fairly unhappy life.

23 39. Pearl Stanley was Stanley’s step-mother. She recalled that Stanley was always
24 respectful. When Stanley was 11 or 12, he saved her from a house fire started by her own
25 grandchildren.

26 40. Reverend Joseph Hayes was Stanley’s uncle. Hayes thought Stanley was attached
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1 to his mother. While she was alive, Stanley committed burglaries and brought the money to his
2 mother. When Hayes saw Stanley stealing he encouraged him to do the right thing and become a
3 good citizen

4 41. Cynthia Williams was Stanley's cousin. She said that Stanley was always a kind
5 person who tried to look after his brother.

6 42. Issac Stanley was Stanley's brother. Issac said that Stanley started using crack
7 cocaine on a daily basis in December 1988. When under the influence of crack Stanley became a
8 different and violent person. During the night Rubaclava was stabbed, Stanley was under the
9 influence of crack.

10 43. Everett Gremminger was a former Oakland police officer. Apparently he never met
11 Stanley. He testified concerning the effects of crack cocaine. He said that long-term use of crack
12 caused some people to experience hallucinations and paranoia, but people who commit crimes
13 while on crack were aware of their crimes and remembered committing them.

14 44. Dr. Pierce testified that Stanley had an "over-idealized self-image which covers his
15 true feelings of fear and inadequacy." According to Pierce, when this kind of personality is under
16 the influence of crack it would be more aggressive. He said that Stanley was on crack at the time
17 of the offenses. Pierce said that Stanley told him that during the period he committed the charged
18 robberies, including the robbery/murder of Rubaclava, he could no longer control his behavior, his
19 crack addiction controlled him, and he "just started sticking people up."

20 45. Dr. Pierce said he interviewed the following "significant others" concerning
21 Stanley: Reverend Joseph Hayes, Winnie Williams (Stanley's aunt), Otis Stanley, and Pearl
22 Stanley. Pierce also interviewed Reverends Wright and Hayes to determine "how they saw certain
23 things happening in the community of the time from '84 to '89." However, Pierce's billing
24 records do not indicate he ever interviewed Winnie Williams.

25 46. In my opinion, Dr. Benson's testimony can only be described as strange. The first
26 15 pages of Benson's substantive testimony on direct-examination did not mention Stanley.

1 Instead, he described crack addiction and its effects. Over the last two pages of his direct-
2 examination he testified that Stanley was “severely addicted to crack cocaine” at the time of the
3 offenses. As such, Stanley was “very reminiscent of the monkey who would continually use this
4 drug until he convulsed and died. That behavior, that drug-seeking behavior appeared to be there”
5 in Stanley’s case.

6 47. On cross-examination, Pierce said that Stanley showed no signs of either emotional
7 or psychological disturbance, or any organic signs of neurological difficulties. Pierce said he
8 “found” no history of head injury, loss of consciousness, seizure disorder, or significant
9 hyperactivity. Benson testified on cross-examination that Stanley was not insane.

10 48. As noted above, Richard Hove became co-counsel for Stanley on or about February
11 1, 1991. The deposition of Hove was taken by the parties in 2012. Stanley’s trial started with the
12 voir dire of potential jurors on February 26, 1991, less than a month after Hove’s first appearance.
13 When asked what defense was to be presented at trial, Hove testified that “we did go on a –
14 essentially an ID matter issue, ‘I didn’t do it’ defense because that’s what Darren (Stanley), I
15 believe, wanted to do. (Hove deposition, pp 17-18.) When asked if he recalled statements Stanley
16 made to defense investigators, Hove testified, “No, I don’t, cause I didn’t do any investigation on
17 the case.” (Hove deposition, p. 97.) Hove, added, “I never investigated anything.” (Hove
18 deposition, p. 98.) Hove similarly testified that he could not recall “him (Stanley) talking to me
19 directly about the crime.” (Hove deposition, p. 198.) When asked specifically about the penalty
20 phase, Hove testified, “Once again I can’t say - have to say I don’t remember doing any
21 investigation.” (Hove deposition, p. 120.) Concerning mitigating evidence in the form of
22 “background information” on Stanley, Hove testified, “there were a lot of things with Darren
23 (Stanley) that we had difficulty with because as I think I used the term, Lincoln Mintz called
24 Darren an asshole. Darren had been an asshole all his life...” (Hove deposition, p. 122.) Why
25 Cannady decided to present a defense based upon the assertion that Stanley “didn’t do it” is not
26 presently known. Hove suggested his retrospective belief that Stanley “wanted to do” such a
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1 defense. But Hove admitted that he conducted no investigation and he could not recall ever
2 talking to Stanley “about the crime.”

3 49. Based upon the above outlined facts, at the present time counsel for Stanley believe
4 the following can be said about the investigation and presentation of the defense at Stanley’s trial.
5 These facts directly concern the ineffective assistance of counsel claims to be raised in Stanley’s
6 finalized petition.

7 50. No later than the meeting on August 13, 1990, Cannady decided to present a guilt
8 phase defense that Stanley did not commit the robbery and stabbing of Rubaclava. This decision
9 was made in spite of the fact that Cannady knew that Stanley’s older brother, Issac, told defense
10 investigators that he saw Stanley stab Rubaclava. Issac was a prosecution witness at trial. Cannady
11 also knew that Stanley’s claim that he was at a motel with an unknown “toss-up” woman, then
12 later at his father’s house, could not be corroborated in any way. For example, Stanley’s father did
13 not corroborate it, and the motel could not be identified by Stanley. Cannady additionally knew
14 that during the same interview in which Stanley told defense investigators that he was with the
15 “toss-up” woman he also said that he was born and raised in New York. Cannady knew that
16 statement was not true. Cannady concluded that Stanley’s guilt phase defense would fail “unless
17 something drastically changes with respect to either Mr. Stanley’s attitude or we manage to pick a
18 jury of subnormal intelligence.” Assuming Stanley was the one who wanted to put on the flimsy,
19 if not outright absurd, motel-alibi defense, it is unclear whether Cannady believed he (Cannady)
20 was obliged to put on an untenable defense because of his client’s “attitude.”

21 51. Despite believing the defense that Stanley did not stab Rubaclava would fail,
22 Cannady decided at the same meeting in August 1990 not to investigate or present mental state
23 evidence at the guilt phase. The basis for this decision is not at all clear. Drs. Benson and Pierce
24 had, according to Cannady, been primarily hired to deal with Stanley’s erratic behavior. At that
25 time, Drs. Benson and Pierce knew next to nothing about Stanley’s social history, family history,
26 or medical history. At that time they had no medical records, school records, probation records,
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1 prison records, or CYA records. They had interviewed only Stanley's uncle and father one time.
2 Indeed, Cannady recognized this lack of information when he requested funds for penalty phase
3 investigation. On the other hand several indicators of mental illness were observed by Cannady,
4 Benson, Pierce, and Olivier. They were aware of Stanley's "erratic" behavior, his false claims
5 about being born and raised in New York, and his claims that he spoke Swahili, African, Hebrew,
6 Latin, and Arabic. Dr. Pierce wrote that Stanley had a heightened sense of self importance with
7 exaggerated accomplishments and "special talents" while also being unusually cautious and
8 suspicious. The doctors also knew that Stanley had memory problems. He told Dr. Benson that he
9 could not remember what happened yesterday. In short, it is not at all clear why Cannady decided
10 to present a defense he believed would fail, while also deciding not to investigate a mental state
11 defense.

12 52. It appears that after August 13, 1990, Cannady had Drs. Benson and Pierce focus
13 only on penalty phase investigation. Yet, nothing was done in this regard until May 23, 1991. The
14 first penalty phase witness interviewed by Drs. Benson and Pierce after May 23 was Reverend
15 Hayes on June 1, 1991. Hayes had been interviewed twice before. Cannady told the funding
16 committee in his declaration of August 24, 1990, that if he "had approximately one to two months
17 from the guilt phase to the penalty phase, then some of the preparation (for the penalty phase) can
18 be alleviated until that point. However, if we are going to be in a situation where we only have
19 approximately a week to prepare the penalty phase, then we are going to have more problems."

20 53. The guilt phase verdicts were returned on June 10. The penalty phase began on
21 June 11. The prosecution rested its penalty phase case on June 12, 1991. Cannady did not have
22 the one or two months between the guilt and penalty phases that he hoped. He actually had one
23 day.

24 54. No penalty phase investigation was conducted between September 1, 1990 and May
25 23, 1991, except the second interview of Reverend Joseph Hayes on November 15, 1990. The
26 next penalty phase interview was also Reverend Hayes on June 1, 1991.

1 55. It is not clear why Cannady conducted no penalty investigation between August,
2 1990 and June 1, 1991. It is not clear whether his self-inflicted problems with court funding
3 caused him to suspend the penalty phase investigation or whether he believed he would have a
4 month or two to investigate the penalty phase after the guilt phase ended. It is not clear what the
5 penalty phase defense was supposed to be. It is not clear whether anyone, Cannady, Benson,
6 Pierce, or Olivier, ever discussed the penalty phase with Stanley.

7 56. As noted above, on August 15, 1990, Olivier wrote a memorandum to Cannady
8 which expressly stated that Cannady needed to obtain Stanley's records from CYA by either
9 subpoena or court order. Cannady never did this. Nor did Cannady ever obtain any medical
10 records concerning Stanley's mother, Dorothy Stanley. It does not appear that Cannady ever
11 obtained any of Stanley's school records or probation records. Because Cannady failed to obtain
12 these documents, Drs. Benson and Pierce never saw them at any time before or during Stanley's
13 trial.

14 57. State habeas counsel obtained numerous medical records concerning Dorothy
15 Stanley. These records show, among other things, that on November 28, 1974, Dorothy Stanley
16 was hospitalized at Herrick Hospital in Oakland. Dorothy voluntarily admitted herself because she
17 was starting to "decompensate" and had suicidal thoughts. She said she was experiencing visual
18 hallucinations and felt things crawling under her skin. She said she didn't know why but that she
19 wanted to kill her father's dog. She thought that the dog needed killing. The doctors at Herrick
20 Hospital described her behavior as "passive-aggressive." She was treated with Mellaril, also
21 known as Thioridazine, which is used to treat symptoms of schizophrenia. Her discharge
22 diagnosis was "psychotic - depressive reaction.

23 58. State habeas counsel also obtained the CYA records that Cannady never obtained.
24 These records showed that in 1985, during an amenability determination at CYA, Stanley was
25 examined by several juvenile mental health workers. Stanley was 18 at that time. A case worker
26 specialist, Linda Paoli, wrote "clinical impressions" of Stanley. She described Stanley as a "very
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1 impulsive, moody, and overly sensitive individual” who “has problems with authority and often
2 views the world in a very idiosyncratic way. In other words, his perception of what is going on is
3 often different from the perception of most other individuals.” She also noted that while in CYA
4 custody “Darren (Stanley) has experienced periodic episodes of depression related to grief over his
5 mother’s and grandfather’s death and his separation from his girlfriend. His moods may vary from
6 depression and tears to cantankerous anger.” She finally noted that Stanley’s past failures at CYA
7 and on parole “may be related to his impulsivity and possible mood disorder.”

8 59. A CYA psychologist, Dr. Larry Nicholas, also examined Stanley. He concluded:
9 “Evidence suggesting poor reality contact, thought disturbance, and grandiose delusions was noted
10 as well. It may well be that this defendant suffers an affective disorder such as a bipolar disorder,
11 currently in remission, as Dr. Robinson suggests.”

12 60. A CYA psychiatrist, Dr. Muriel Robinson, also examined Stanley. If alive, she is a
13 critical witness to these federal habeas proceedings. In her report dated March 12, 1985, Dr.
14 Robinson noted that Stanley had been using marijuana since the seventh grade and alcohol since
15 he was fifteen. She noted his “undaunted optimism bordering on loss of contact with reality”
16 which suggested “specific mood disturbance of the bipolar type.” She further noted his “near-
17 euphoric mood” and “delusional portions of the interview.” Dr. Robinson diagnosed Stanley with
18 “Atypical Conduct Disorder” and “Bipolar Disorder, Manic, in remission.” In her conclusion, Dr.
19 Robinson noted that her diagnosis of “Bipolar Disorder, Manic” was based on four factors. First,
20 she cited Stanley’s history of unusual and reckless behavior including his escape from a moving
21 police car. Secondly, she cited the “agitation often seen during the remission phase of Bipolar
22 Disorder. Thirdly, she cited his “rather grandiose tone” and “possible depression.” Finally, she
23 cited his near-euphoric mood” during her interview of Stanley. She also noted that she did not
24 have a family history for Stanley which would assist her in determining “the prevalence of mood
25 disorder in the family.”

26 61. In an addendum to her report, dated April 16, 1985 and written approximately six
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1 weeks later, Dr. Robinson found evidence of Stanley's "distinct mood cycling" which conformed
2 "the presence of an affective disorder." She noted that Stanley stayed in his room for two weeks
3 during which he was described as "introverted" and "withdrawn." This was followed by four
4 weeks of "boisterous, disruptive behavior." He was examined by Dr. Robinson during this period
5 and found "to be in a near-euphoric mood." This period was followed by another period of
6 introverted behavior with "withdrawal-type behavior." When examined by Dr. Robinson during
7 this period, Stanley "appeared to be depressed, was verbally under-productive, and reported
8 hypersomnia again; speech and motor activity were slowed." In her conclusion, Dr. Robinson
9 stated that "the diagnosis of 301.13 Cyclothymic Disorder have been met and replaces the Bipolar
10 Disorder on Axis I." She recommended Lithium therapy for mood stabilization. (DSM-IV
11 describes Cyclothymic Disorder as a fluctuating mood disturbance involving numerous periods of
12 hypomanic symptoms and numerous periods of depressive symptoms. It usually begins early in
13 life and is often considered to reflect a predisposition to other Mood Disorders especially Bipolar
14 Disorders. Cyclothymic and other Bipolar disorders are more common among first degree
15 biological relatives.)

16 62. After state habeas counsel obtained these documents he asked Dr. Benson to review
17 them. He asked Dr. Benson if these documents altered his opinion of Stanley's mental health. Dr.
18 Benson concluded that if he had this information at the time of Stanley's trial he would have found
19 that Stanley "suffered from a psychiatric illness called Bi-Polar Disorder which is inherited,
20 biologically based and potentially psychotic..." Dr. Benson opined that there was a "strong
21 possibility" that Stanley was "delusional and in a full blown manic state" at the time of the capital
22 murder and other offenses. Dr. Benson noted that from at least the time Stanley was thirteen years
23 old he suffered from Attentional Deficit Hyperactivity Disorder. That "disease progressed to
24 Cyclothymia, and by 1988 to full blown Bi-Polar Disorder." As a result, Stanley "probably
25 suffered from dementia, had no ability to exercise executive functioning, could not learn from his
26 mistakes, and became more delusional as he grew older." Dr. Benson further concluded that the

1 “natural progression of this disease” would lead Stanley “to experience a diminution of mental
2 functioning and emotional stability to the point of eventually he may become unresponsive to all
3 stimulus except the most primitive, such as eating.” Dr. Benson also noted that based upon the
4 information obtained by state habeas counsel it could be said that Stanley’s mother, brothers, three
5 maternal uncles, three maternal first cousins, and other members of his family were alcoholics.
6 Dr. Benson noted: “There is a high correlation between alcoholism and major mental illness,
7 particularly major affective disorders, such as Bi-Polar Disorder. Alcohol is a control for manic
8 behavior, making a Bi-Polar person appear more normal, controlling mood swings.” Dr. Benson
9 also noted that Stanley’s mother “was drinking alcohol before he was born” and that “fetal alcohol
10 exposure can lead to mental illness and organic brain disease.” Stanley’s father similarly noted:
11 “Darren’s mother Dorothy Stanley was drinking heavily a few years before Darren was born. At
12 that point, based upon my observations, she drank about two pints a day of scotch or brandy.”

13 63. On July 16, 2013, the Court found Stanley permanently incompetent to assist
14 counsel. Respondent’s mental health expert, Dr. Daniel Martell, noted that Stanley maintains a
15 complex and wide ranging system of bizarre delusions and that this delusional system has grown
16 to incorporate most of the experiences and people around him. Counsel believe that Stanley has
17 no memory of the offenses, of his conversations with his trial counsel and investigators, or of the
18 defense presented at trial. What memory he does retain seems to be based more on his delusions
19 than reality. As a result, counsel cannot obtain information from Stanley about the offenses. For
20 instance, counsel cannot determine from Stanley whether or not Issac Stanley’s testimony about
21 the stabbing is accurate or whether Issac could have been impeached about his eyewitness account.
22 Counsel cannot obtain from Stanley information about the investigation of the guilt phase defense.
23 For instance, counsel cannot determine whether Stanley gave information to trial counsel about
24 possible alibi witnesses, or if Stanley suggested or “insisted” upon such a defense. Nor can
25 counsel verify the accuracy of Hove’s statement that a defense that Stanley “didn’t do it” was
26 presented because Stanley wanted such a defense presented. Did Stanley’s purported wish
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1 outweigh evidence of a mental state defense? Counsel cannot determine from Stanley what
2 information was given to trial counsel about Stanley's social history, family history, medical
3 history, or other information which was, or would lead to, mitigating evidence.

4 64. This lack of information from Stanley is compounded by the death of Cannady. In
5 nearly all of his funding requests Cannady described Stanley as difficult, erratic, and volatile.
6 Cannady said that if Stanley was convicted and sentenced to death it would be the result of "Mr.
7 Stanley's own attitude" which Cannady thought would "permeate this trial." Cannady never
8 provided specific examples of Stanley's erratic and volatile behavior. Nor did Cannady explain
9 why Stanley's attitude, rather than the trial evidence, would cause the jury to convict Stanley and
10 sentence him to death. Was Stanley's behavior and attitude indicative of mental illness?

11 65. Counsel do not know why Richard Humphrey was removed as co-counsel for
12 Stanley two months before the start of trial. Did Humphrey disagree with Cannady's decisions
13 about trial strategy? Counsel do not presently know what input Humphrey had, if any, on the
14 investigation of either the guilt or penalty phases. In his letter of April 5, 1990, Humphrey told
15 Cannady that they needed to hire a second investigator and/or a social historian as part of the
16 penalty phase investigation. No second investigator or social historian were ever hired. Counsel
17 do not know why.

18 66. Cannady was aware that Stanley had memory issues and other signs of mental
19 illness. Nevertheless, he rejected any kind of mental state defense with little or no investigation.
20 Counsel do not know why Cannady made this decision.

21 67. No later than August 24, 1990, Cannady decided that the defense at the penalty
22 phase would focus on Stanley's "psychological background and his upbringing." Yet virtually no
23 investigation was conducted before trial concerning those issues. Counsel do not know if Cannady
24 believed that he would have a month to two months to investigate those issues after the guilt phase
25 verdicts were returned.

26 68. Cannady told Drs. Benson and Pierce to stop working on Stanley's case in October,
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1 1990. It is not clear why Cannady did this. Was Cannady's decision based solely on his problems
2 with funding from the court or did Cannady believe that the investigation already conducted was
3 sufficient?

4 69. Cannady never obtained Stanley's CYA, prison, probation, or school records which
5 demonstrated a history of mental illness. Why Cannady never obtained these documents is
6 unclear.

7 70. As noted above, counsel intend to include in the finalized petition numerous
8 ineffective assistance of counsel claims. For instance, the finalized petition will allege that trial
9 counsel were ineffective for failing to raise the issue of Stanley's competency to stand trial. The
10 finalized petition will also allege claims that trial counsel were ineffective in their guilt phase
11 investigation and in their failure to present a mental state defense at the guilt phase of trial. Such a
12 defense would have alleged that Stanley could not form the necessary intent for first degree murder
13 or robbery. The finalized petition will allege that a viable insanity defense existed and should have
14 been investigated and presented. The finalized petition will also allege that trial counsel were
15 ineffective for failing to adequately investigate and present mitigating evidence at the penalty
16 phase trial. It should be noted that the vast majority of the prosecutor's evidence in aggravation
17 consisted of testimony of Stanley's misconduct and assaults while in prison and while in the
18 county jail awaiting trial. Evidence of Stanley's mental health issues would have greatly reduced,
19 if not fully explained, these incidents in aggravation.

20 71. Counsel anticipate that Respondent's opposition to each and every claim of
21 ineffective assistance of counsel will assert that trial counsel made informed strategic and tactical
22 choices and were thus effective. See *Correll v. Ryan*, 539 F.3rd 938, 948 (9th Cir. 2008): "A
23 reasonable tactical choice based on an adequate inquiry is immune from attack under *Strickland*."
24 As the preceding paragraphs indicate, counsel do not know why trial counsel made many of their
25 decisions concerning Stanley's defense. For instance, counsel do not know why Cannady failed to
26 hire a second investigator or social historian as Humphrey suggested. Put simply, counsel know
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1 what trial counsel did, they do not know why they did it. The answers to these questions would
2 normally come from trial counsel and the petitioner. Those sources of information are not
3 available to counsel in this case.

4 73. At the very least, in order to file a finalized petition alleging ineffective
5 assistance of counsel claims, counsel must interview the following individuals: Richard
6 Humphrey, Brian Olivier, Clarrick Brown, Dr. Samuel Benson, Dr. William Pierce, and Dr. Muriel
7 Robinson. Counsel will have to obtain the information they would normally obtain from Stanley
8 and Cannady from these individuals. These interviews must take place within the next 90 days.
9 Normally, the interviews of Stanley would have been completed long ago. Thereafter, counsel
10 must incorporate the information obtained from these individuals into the finalized petition.

11 74. Counsel are not presently aware of the location of these individuals. Counsel are
12 not even aware if any or all of them are still alive. For instance, Dr. Muriel Robinson's
13 examinations of Stanley took place over 30 years ago. Assuming they can be located and
14 interviewed, it is anticipated that their memory of Stanley's case will be limited. Therefore,
15 counsel will have to obtain and provide to them numerous documents in order to supply the
16 background and context of counsels' inquiries. This process will be time consuming.

17 75. Additionally, it may not be possible for these six witnesses to provide all of the
18 necessary information. Some of them may not be located. In that case, counsel would have to
19 seek out and interview secondary witnesses and obtain additional documents. For instance, family
20 members may have provided information to trial counsel about evidence in mitigation. Such
21 information may have included descriptions of incidents in which Stanley engaged in behavior
22 indicative of mental illness. This information may be gathered by way of interviews of these
23 family members. However, even this process is further complicated by the recent deaths of
24 Stanley's father and brother (Issac).

25 76. On May 10, 2013, this Court granted Stanley's motion for discovery regarding his
26 claims that the prosecutor withheld exculpatory evidence at trial. (Docket # 97.) The Court
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1 concluded, “Good cause appearing therefore, the Court grant’s Petitioner’s Motion for
2 *Brady/Napue* Preservation Discovery.” The Court ordered that Stanley schedule and take the
3 depositions of the trial prosecutor Theodore Landswick, former Alameda district attorney inspector
4 Robert Gannon, former Oakland police officers Ignatius Chin and Michael Sitterud, and former
5 Alameda County criminalist Alan Keel. Stanley’s preservation discovery motion was granted
6 while the stay to determine Stanley’s competency was still in place. Counsel will need to
7 complete the preservation discovery and incorporate the facts developed into the finalized petition.

8 77. Without additional tolling, counsel will have 127 days in which to prepare and file
9 Stanley’s finalized petition. As a result of Stanley’s incompetence and Cannady’s death, counsel
10 do not believe they can develop the necessary factual basis for numerous ineffective assistance of
11 counsel claims in that period of time. Counsel are asking for an additional 90 days because they
12 believe that such additional time will provide them sufficient opportunity to either obtain the
13 necessary facts or determine that such facts are no longer obtainable. Counsel believe the situation
14 present here is just the kind of extraordinary circumstance beyond the petitioner’s control that
15 justifies the limited equitable tolling being sought.

16
17 I declare under the penalty of perjury that the foregoing is true and correct to the best of my
18 knowledge. Executed January 25, 2016, at San Rafael, California.

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20
21 /s/
22 DAVID NICKERSON
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